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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1975

## No. 74-1055

W. T. STONE, WARDEN,
*Petitioner,*

VS.

LLOYD CHARLES POWELL,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR THE PETITIONER

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR THE PETITIONER

### OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit appears as Appendix A to the Petition for Writ of Certiorari and is reported at 507 F.2d 93; the unreported memorandum opinion and order of the United States District Court for the Northern District of California appears as Appendix B to the Petition.

### JURISDICTION

The judgment of the court of appeals was entered on December 4, 1974. The Petition for Writ of Cer-

tiorari was docketed in this Court on February 22, 1975, and granted on June 30, 1975. The jurisdiction of this Court is conferred by Title 28, United States Code section 1254(1).

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**QUESTIONS PRESENTED**

1. Whether the purposes of the exclusionary rule are served by suppressing evidence seized during the incidental search of the respondent by a police officer who had probable cause to believe that the respondent had violated a then-valid ordinance; or whether reasonable reliance upon a coordinate branch of government by a police officer should foreclose the application of the exclusionary rule.

2. Whether the Fourth Amendment claims of a state prisoner should be cognizable under 28 U.S.C. § 2254.

a. Whether *Kaufman v. United States,* 394 U.S. 217 (1969), should be overruled to the extent that it permits state prisoners, who have been afforded a fair opportunity in the state courts to litigate their Fourth Amendment claims, to relitigate those questions on federal habeas corpus.

b. Whether, in light of the fact that the District Court found that the Henderson, Nevada, police officer had probable cause to arrest respondent for violation of an ordinance which at the time of the arrest had not been authoritatively determined to be unconstitutional, respondent's claim that the gun discovered as a result of a search incident to that arrest



violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution is one cognizable under 28 U.S.C. § 2254.

3. Whether the vagrancy ordinance of Henderson, Nevada, is constitutional.

4. Whether the admission of the evidence, even if unlawfully seized, was error harmless beyond a reasonable doubt.

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**STATEMENT OF THE CASE**

**A. Proceedings in the state courts.**

On June 6, 1968, Lloyd Charles Powell, respondent herein, was convicted by a jury after trial in the Superior Court of San Bernardino County, California, of murder in the second degree in violation of California Penal Code section 187. He was sentenced to State prison for a term of from five years to life. On October 7, 1969, the California Court of Appeal, Fourth Appellate District, Division Two, affirmed the judgment in an unpublished opinion which appears as Appendix C to the Petition for Writ of Certiorari. Respondent's petition for writ of habeas corpus was denied by the California Supreme Court on July 1, 1970.

**B. Proceedings in the federal courts.**

On August 24, 1971, Powell filed an amended petition for writ of habeas corpus in the United States District Court for the Northern District of California. On February 8, 1972, the district court filed an order denying the petition.

An order granting a certificate of probable cause to appeal having been issued by the district court on February 22, 1972, respondent appealed to the United States Court of Appeals for the Ninth Circuit. On December 4, 1974, the court of appeals filed its opinion reversing the judgment of the district court and remanding the matter to the district court for further proceedings.

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## STATEMENT OF THE FACTS

On February 18, 1968, Gerald and Mary Parsons managed the Bonanza Liquor Store located at 1052 West Fifth Street in San Bernardino, California. About midnight, Mr. Parsons, working in a rear office, heard the bell at the store's entrance. He looked through a one-way glass in the wall separating the office from the store to see that four men had entered (Tr. 7-11, 27). The men were Fred Buckley, John Chaney, Lester Mercer and respondent Lloyd Charles Powell (Tr. 66, 133, 164).

While Mercer was purchasing cigarettes and beer from Mrs. Parsons, who was behind the counter (Tr. 9, 67), respondent removed a bottle of wine from a shelf and concealed it under his jacket. Parsons approached respondent, asking, "What about that wine?" Respondent queried, "What wine?" Mrs. Parsons replied, "That wine under your jacket" (Tr. 11). Mr. Parsons opened respondent's jacket, exposing a half-gallon bottle of wine. Respondent then struck Mr. Parsons in the mouth with his fist as Mercer blocked the store manager's way (Tr. 11, 29, 32, 36-37).



Two of the men, apparently Chaney and Mercer, left the store (Tr. 12, 135, 169-70). Respondent quickly followed. Mr. Parsons then asked his wife for a .38 caliber revolver which was kept near the cash register (Tr. 12). Respondent soon returned, advancing toward Mr. Parsons, who pointed the gun at his assailant. When respondent did not stop, Mr. Parsons cocked the gun, "raised it out of the line of anybody," and discharged the revolver into the ceiling (Tr. 16).

Mr. Parsons then discarded the gun behind the ice cream freezer, but respondent rushed past him and seized the weapon. Mr. Parsons heard an "explosion" and discovered a bullet wound in his right wrist (Tr. 17).

The store manager ran for another gun which he kept in the store office. While searching for the weapon he heard, in succession, a shot ring out, his wife scream, and the cash register drawer open. He returned to the store to discover Buckley leaning over the cash register. Buckley fled when Parsons fired a shot at him (Tr. 18-19). Mrs. Parsons was lying behind the counter, a bullet wound below her neck (Tr. 23-24). Mr. Parsons testified that, once he discarded the .38 revolver, he saw only respondent handle it (Tr. 24).

Buckley, Chaney, and Mercer gave testimony which differed only slightly from that of Mr. Parsons. All three men stated that respondent accompanied them to the liquor store (Tr. 66, 133, 164). Buckley stated that he saw respondent strike Mr. Parsons. The store

manager then secured a gun from his wife and pointed it at respondent, who grabbed Mr. Parsons' arm, causing the gun to discharge into the ceiling (Tr. 70). Mr. and Mrs. Parsons and respondent struggled for the gun which consequently fell from Mr. Parsons' hand (Tr. 72). Buckley then saw respondent holding the pistol and heard the report of a gun shot. Mrs. Parsons fell to the floor. The gun discharged again, wounding Mr. Parsons in the arm (Tr. 85-86).

San Bernardino Police Officer Donald Covey later took a statement from Buckley at San Bernardino County Hospital (Tr. 161). Buckley told the officer that respondent had hidden a bottle of wine under his coat, the manager spotted it, respondent took possession of the gun and "shot the manager's wife and, then, the manager" (Tr. 161-62).

Lester Mercer apparently saw little of the confrontation in the liquor store. After paying for his beer, Mercer heard Mrs. Parsons ask respondent if he was going to pay for the wine he had taken. Respondent denied that he had taken wine, but Mercer saw a bulge beneath his coat (Tr. 133-34, 143). An argument ensued; Mrs. Parsons reached for a gun (Tr. 134). She handed the weapon to her husband who began to wave it. Mercer turned to leave the liquor store, intending to seek help (Tr. 135). As he left the store, Mercer heard a shot fired (Tr. 136). However, he saw no one injured by the shot (Tr. 151).

John Chaney testified that, as he, Mercer, and Buckley were pooling their funds to purchase vodka, he



heard Mrs. Parsons ask respondent, "What about that wine?" When respondent denied that he had wine, Mr. Parsons grabbed his coat, causing him to drop the bottle to the floor. Chaney testified that he offered to pay for the broken bottle, but respondent had shoved Mr. Parsons, who asked his wife for the gun (Tr. 165-67). Mrs. Parsons was throwing objects at respondent as he and her husband were "wrestling" (Tr. 169). The gun discharged during the scuffle, and respondent grabbed it. Respondent was in possession of the gun as Chaney fled from the store (Tr. 169).

San Bernardino Police Officer Bradford Hilder arrived at the Bonanza Liquor Store at 12:15 a.m. on February 18, 1968, but observed no broken wine bottles within the store. However, he did find a full half-gallon bottle of Gallo Wine outside the store 225-28, 260).

At 10:10 a.m. on February 18, 1968, Officer Edward Lattin of the Henderson, Nevada, Police Department was on routine patrol in a marked police car near the parking lot of a shopping center near the City of Henderson. He saw two men, one of whom was respondent, look at his police car and turn quickly, walking in the opposite direction (App. 5). The men looked back toward the police vehicle while continuing to walk rapidly. The officer made a U-turn and approached them. The men then split apart, walking in opposite directions. The officer followed respondent and directed him to halt. Respondent failed to do so, continuing to walk rapidly toward the rear of a department store. The officer finally stepped

from his vehicle and ordered respondent to stop. Respondent complied (App. 6-7).

Officer Lattin asked respondent for identification. He replied that his identification papers had been stolen. In response to further questions, respondent said that his name was Lloyd Charles Powell and that his date of birth was January 6, 1947. The officer checked respondent's name through the records of the Henderson Police Department but discovered nothing (App. 8). Respondent told Officer Lattin that he had been staying "with friends in Las Vegas" but was unable to give their names or addresses (App. 8). He explained only that he had been in Las Vegas "for the past few days" (App. 16) and that he was en route to Michigan (App. 9). Henderson is eight miles south of Las Vegas; a person traveling from the latter city to Michigan would proceed east and would not pass through Henderson (App. 12, 27-28). Officer Lattin arrested respondent for violation of the Henderson Vagrancy Ordinance (App. 9). A search incident to the arrest disclosed in the pocket of respondent's coat a pistol with six expended cartridges in the cylinder (App. 18-19).

Mary Parsons died at 5:45 a.m. on February 18, 1968 (Tr. 184). A lead slug was removed from the lung of the body on the same day. Examination of the slug and bullets fired from the gun found on respondent's person disclosed a high degree of similarity of individual striation markings. This similarity led Criminalist John Davidson to testify that the bullets were fired from the same weapon (Tr. 235-40).



## SUMMARY OF ARGUMENT

In February 1968, respondent was arrested in Henderson, Nevada, upon probable cause to believe that he had violated that municipality's vagrancy ordinance, whose validity had never been challenged. An incidental search revealed the weapon which he had used to murder a woman in San Bernardino, California. Almost seven years after the arrest, the court of appeals held that the ordinance was unconstitutionally vague and that its vagueness dictated suppression of the evidence and, consequently, a new murder trial for respondent in California state court. The reasons given for the application of the exclusionary rule to set aside respondent's conviction were to deter legislative enactment of unconstitutional statutes and to preserve the integrity of the state judiciary.

We argue that no tenable purpose could possibly be served by the suppression of evidence in this case. It could not deter police misconduct, the prime purpose of the exclusionary rule, because there was no "misconduct" under any definition of that word. The arrest was based upon probable cause and the arresting officer reasonably and in good faith relied upon the presumptive validity of the ordinance. Exclusion of evidence in this case would only cause police officers to be reluctant to enforce laws whose validity had not been authoritatively determined. The detrimental effect upon the vigorous and uniform enforcement of the law is obvious and intolerable. We contend, therefore, that evidence found by police who

reasonably and in good faith rely upon a coordinate branch of the government—the legislature of the judiciary—should not be suppressed.

The imperative of judiciary integrity cannot justify exclusion. That doctrine, of dubious vitality, was created and developed in those decisions in which this Court exercised its supervisory power. That power, a nonconstitutional source of authority, cannot be exercised over the states. For that reason judicial integrity, spawned from and supported by this Court's inherent power over lower federal courts, cannot be imposed upon state tribunals. This court has not been granted supervisory authority over state courts. Even if it had such authority, judicial integrity would not compel suppression of reliable and probative evidence where, as here, the arrest and search were conducted pursuant to a statute that was valid at the time.

Evidence should not be suppressed to deter enactment of unconstitutional statutes. That purpose can be served less drastically and more effectively by the invalidation of the statute. Exclusion would be especially ineffective in this case because Nevada legislateors would not be deterred by the reversal of a California conviction. As there is no reason to exclude evidence, reliable and probative of guilt, it was properly admitted at trial.

Although the ordinance may have violated the Fifth Amendment, it did not offend the Fourth Amendment, which applies to searches, not to legislation. Since the search in this case was based upon probable cause, suppression of evidence could not further any value protected by the Fourth Amendment.



Alternatively, we contend that the Fourth Amendment claims of state prisoners should not be cognizable on federal habeas corpus. The benefit of deterring police misconduct is speculative. The cost—in terms of misallocation of resources, duplication of effort, friction between federal and state courts, deprivation of the states' interest in finality, and freeing guilty persons—is manifest and unacceptable. This conclusion is especially compelling in this case where the violation of the Fourth Amendment, if any, was merely "technical." Such violations, in contrast to those which demonstrate police brutality or bad faith, should not be considered on federal habeas corpus.

The vagrancy ordinance is not vague as applied to respondent.

Admission of evidence, if error, was harmless beyond a reasonable doubt.

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## ARGUMENT

### I

### THE ARREST OF RESPONDENT, MADE IN GOOD FAITH AND IN REASONABLE RELIANCE UPON A PRESUMPTIVELY VALID ORDINANCE, WAS LAWFUL AT THE TIME. THE ORDINANCE'S SUBSEQUENT INVALIDATION DOES NOT COMPEL APPLICATION OF THE EXCLUSIONARY RULE.

#### A. The Opinion Below.

In its opinion below, the court of appeal held that the vagrancy ordinance[1] of Henderson, Nevada, under which respondent was arrested, "'is void for vague-

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[1]That ordinance provides: "Every person is a vagrant who: Loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself

ness, both in the sense that it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," [Citation.] and because it encourages arbitrary and erratic arrests and convictions. [Citations.]'" *Powell v. Stone,* 507 F.2d 93, 95 (1974), *quoting from Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972). The court decided that the ordinance violated respondent's right under the Fifth and Fourteenth Amendments to fair notice of the prohibited conduct. *See Parker v. Levy,* 417 U.S. 733, 752 (1974); *Smith v. Goguen,* 415 U.S. 566, 572 (1974); *Lanzetta v. New Jersey,* 306 U.S. 451, 453 (1939). The ordinance also violated respondent's rights under those amendments to be free from arbitrary and discriminatory enforcement of vague statutes. *See Grayned v. City of Rockford,* 408 U.S. 104, 109 (1972); *Thornhill v. Alabama,* 310 U.S. 88, 97-98 (1940).

The court also found that the vagrancy ordinance violated respondent's rights under the Fourth and Fourteenth Amendments in two respects. First, it "authorizes arrest and conviction for conduct that is no more than suspicious. A legislature could not reduce the standard for arrest from probable cause to suspicion; and it may not accomplish the same result indirectly by making suspicious conduct a substantive offense." Second, the language of such ordinances "is so general and vague, the elements of the offense so obscure, that they afford no reasonable criteria by

and to account for his presence when asked by any peace officer to do so, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification." 507 F.2d at 95.



which an officer may determine whether the ordinance has or has not been violated." 507 F.2d at 96; *accord Hall v. United States,* 459 F.2d 831, 836-37 (1972); *see also United States* ex rel. *Newsome v. Malcolm,* 492 F.2d 1166, 1172-74 (2d Cir. 1974), *aff'd sub nom. Lefkowitz v. Newsome,* 420 U.S. 283 (1975).

After holding that the arresting officer's good-faith reliance upon the presumptive validity of the ordinance did not render lawful the arrest of respondent (507 F.2d 97-98), the court then considered the question whether the unlawfulness of the arrest compelled the application of the exclusionary rule to the fruits of the arrest. The court held that exclusion was required for two reasons. First, the "public interest may dictate that the police not be deterred from enforcing statutory law even when it mandates unconstitutional conduct, but the public interest is served by deterring legislators from enacting such statutes." 507 F.2d at 98. Second, application of the exclusionary rule is mandated by the "imperative of judicial integrity." *Id.; Elkins v. United States,* 364 U.S. 206, 222 (1960).[2] Since the court of appeals, in "good conscience," could not find that the evidence seized was harmless beyond a reasonable doubt, it reversed the judgment of the district court denying the writ of habeas corpus. 507 F.2d at 99.

[2] *Contra, Hamrick v. Wainwright,* 465 F.2d 940, 941-42 (5th Cir. 1972) (dictum); *United States v. Dameron,* 460 F.2d 294, 95 (5th Cir.), *cert. denied,* 409 U.S. 882 (1972), *rev'd on other grounds,* 488 F.2d 724 (1974); *United States v. Kilgen,* 445 F.2d 287, 289 (1971); *People v. Carnesi,* 16 Cal. App.3d 863, 867-69, 94 Cal. Rptr. 555 (1971); *cf. Potts v. State,* 500 S.W.2d 523, 526 (Tex. Crim. App. 1973) (dictum); *State v. Harbaugh,* 132 Vt. 575, 326 A.2d 821, 825 (1974) (dictum).

For the reasons which follow, we submit that the ordinance did not violate the Fourth Amendment because *no* statute can violate that amendment.[3] The officer made the arrest with probable cause and in good faith, reasonably relying upon the validity of the ordinance. The determination by the court of appeals that the ordinance was "void for vagueness," a premise which we will not challenge in this Argument, does not compel exclusion of the evidence because no recognized purpose of the exclusionary rule would be served by exclusion.

**B. The Fourth Amendment Governs Searches, Not Legislation.**

The Fourth Amendment, made applicable to the States by force of the Due Process Clause of the Fourteenth Amendment (*Mapp v. Ohio,* 367 U.S. 643 [1961]; *Wolf v. Colorado,* 338 U.S. 25 [1949]), provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

The plain language of that amendment is aimed at, and is intended to guide, executive officers who conduct searches and seizures in the course of "the often

[3]This conclusion is not affected by a determination of the validity of the statute under the "fair notice" requirement of the Fifth and Fourteenth Amendments. Whether the ordinance gave respondent fair warning will be examined in Argument III.



competitive enterprise of ferreting out crime" (*Johnson v. United States,* 333 U.S. 10, 14 [1948]), and neutral and detached judicial officers (*Shadwick v. City of Tampa,* 407 U.S. 345 [1972]: *Coolidge v. New Hampshire,* 403 U.S. 443, 449-53 [1971]), who may issue warrants only upon a showing of probable cause. *United States v. Harris,* 403 U.S. 573 (1971); *Spinelli v. United States,* 393 U.S. 410 (1969); *Aguilar v. Texas,* 378 U.S. 108 (1964). The third branch of our tripartite system of government, the legislature, cannot violate the Fourth Amendment because it does not issue warrants or, more to the point, conduct searches.

The Fourth Amendment was adopted in response to the Colonial experience with arbitrary and unjustified searches pursuant to warrants issued without probable cause. *See Weeks v. United States,* 232 U.S. 383, 389-91 (1914); *Boyd v. United States,* 116 U.S. 616, 624-30 (1886). For that reason, the "overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v. California,* 384 U.S. 757, 767 (1966). "The security of one's privacy against arbitrary intrusion *by the police*" "is at the core of the Fourth Amendment" and "basic to a free society." *Wolf v. Colorado, supra,* 338 U.S. at 27 (emphasis added). Simply put, "[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." *Katz v. United States,* 389 U.S. 347, 359 (1967). One respected commentator has postulated that "the regulation of police behavior is what the fourth amendment is all

about." Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minn. L. Rev. 349, 369 (1974).

We submit that both the language and purpose of the Fourth Amendment lead inevitably to the conclusion that it cannot be violated until a government official has conducted an unreasonable search. Enactment of a statute—or, indeed, issuance of a warrant upon less than probable cause—can *never* violate the amendment's commands. Only when the statute is enforced or a warrant is executed by a police officer do the provisions of the Fourth Amendment come into play. *See Sibron v. New York,* 392 U.S. 40, 61 (1968); Comment, N.Y.U.L. Rev. 595, 602 (1972).[4]

[4]The decisions of this Court cited by the court of appeals (507 F.2d at 97-98) do not refute this proposition. In *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973), this Court held unconstitutional the search of the defendant's car because it was conducted without probable cause (*Chambers v. Maroney,* 399 U.S. 42, 47-49 [1970]; *Carroll v. United States,* 267 U.S. 132, 153 [1925]), and was not a border search within the meaning of the statute (8 U.S.C. § 1557(a)), upon which the Government relied. The search, not the statute, was unconstitutional. In *Coolidge v. New Hampshire, supra,* 403 U.S. 443, the search of Coolidge's automobile violated the Fourth Amendment because, *inter alia,* the search warrant which the police officers had obtained was issued by the attorney general pursuant to statutory authorization. This Court held that invalidated the search warrant, and therefore the search, because it was not issued by the "neutral and detached magistrate" required by the Fourth Amendment. *E.g., Johnson v. United States, supra,* 333 U.S. at 13-14. "We find no escape from the conclusion that the *seizure and search* of the Pontiac automobile cannot constitutionally rest upon the warrant of the state official who was the chief investigator and prosecutor in this case." 403 U.S. at 453 (emphasis added).

In *Sibron v. New York, supra,* 392 U.S. at 62, this Court concluded that its "constitutional inquiry would not be furthered here by an attempt to pronounce judgment on the words of the statute. We must confine our review instead to the reasonableness of the searches and seizures which underlie [the] convictions."

*Berger v. New York,* 388 U.S. 41 (1967), is difficult to analyze in terms of its precedential value on this issue. The prevailing opinion apparently declares that the New York eavesdrop statute, "as it is written," "permits a trespassory invasion of the home or office by general warrant, contrary to the command of the Fourth Amendment." *Id.* at 64. To the extent that the warrant before this Court failed to meet the standards of the Fourth Amendment (*id.* at 54-60), the invalidation of the search was required, for a state law cannot authorize an unconstitutional search. *Cf. Almeida-Sanchez v. United States, supra,* 413 U.S. at 272. To the extent that the opinion states that no future search warrant issued pursuant to the terms of the statute can be constitutional if it does not also square with the Fourth Amendment, the decision is justifiable. However, the failure of this Court to discuss the search before it is both puzzling and unjustifiable.

The problem becomes even more complicated in view of the five concurring and dissenting opinions. Justice Douglas apparently believed that *no* eavesdrop could ever be constitutional. 388 U.S. at 64. Justice Stewart concurred in the judgment, stating that the affidavits did not provide probable cause to justify the issuance of the warrant. *Id.* at 69. Justices Black, Harlan, and White took a contrary view, finding that this search complied with the Fourth Amendment. *Id.* at 83-87, 101, 108-12. Thus, four justices considered the facts of the case; four justices examined only the statute; one justice did neither, stating that no eavesdrop could be constitutional. We therefore respectfully question the force of *Berger v. New York* as binding precedent on the issue of whether a statute can violate the Fourth Amendment. *Cf. Ohio v. Price,* 364 U.S. 263, 264 (1960).



With this elementary yet crucial concept in mind, we examine the holding of the court of appeals that the vagrancy ordinance violated the Fourth Amendment. As stated previously, the court declared that the ordinance was void under that amendment for two reasons. First, it permitted arrest and conviction for conduct which was merely suspicious; second, its standards were so vague that no reasonable officer could have probable cause to believe that it may have been violated. We submit that the first reason confuses the interests protected by the Fourth Amendment with those guarded by the Due Process Clause of the Fifth and Fourteenth Amendments. The court's second reason is unsupportable in view of the lan-

guage of the ordinance and the finding of the district court and, indeed, is contradicted by a portion of the court's own opinion.

Starting with the obvious proposition that a "legislature could not reduce the standard for arrest from probable cause to suspicion," the court reasoned that the ordinance accomplished that result indirectly by "authorizing arrest *and conviction* for the vagrancy offense if there are reasonable grounds to suspect that the accused may have committed" a substantive offense. 507 F.2d at 96 (emphasis added). The court's conclusion must be rejected for two interrelated reasons. First, it is true that a legislature may not make suspicious conduct a crime, but enactment of such measures is forbidden by the Due Process Clause of the *Fifth Amendment. See Papachristou v. City of Jacksonville, supra,* 405 U.S. at 163-68;[5] *Hall v. United States, supra,* 459 F.2d at 844 (dissenting opinion); Note, 18 Vill. L. Rev. 117, 123 (1972). The court's reference to "convictions" buttresses the conclusion that it was actually invoking Fifth Amendment principles. The Fourth Amendment—governing searches, not legislation or convictions—is simply irrelevant to the court's analysis.

[5]Although *Papachristou* alludes to Fourth Amendment considerations (405 U.S. at 169), it is clear that the opinion rests solidly upon the due process prohibition against impermissibly vague statutes. The point of its reference to the Fourth Amendment is that vague vagrancy statutes permit pretextual arrests of those who are suspected of committing other, more serious crimes. As there is no evidence in this case that the arrest was pretextual (see Part D of this Argument), that aspect of the *Papachristou* decision is not relevant herein.



Second, the court was proceeding from the implicit premise that probable cause has a viability independent of the statute under which the arrest is made. According to the court, the elements of a penal statute are irrelevant to the existence of probable cause, which therefore is an invariable. But that cannot be so, because probable cause for murder is different from probable cause for robbery, arson, or theft. Probable cause may be determined only by reference to the statute in question, and it is possible that probable cause—a Fourth Amendment concept—may exist under a statute which makes criminal otherwise innocent activity—a Fifth Amendment question. "If probable cause may be described as a reasonable belief that the arrestee is guilty of an offense, such a principle can only have meaning if it is considered in conjunction with the statute describing the offense. Thus, Fourth Amendment requirements would be satisfied if the statute describes suspicious conduct as a crime in such a way as to allow the man of reasonable caution to form a reasonable belief that the arrestee's conduct violates the statute." Note, 18 Vill. L. Rev., *supra,* at 123 (fn. omitted).

To reiterate, the court of appeal misconceived probable cause, treating it as an abstract entity which could not be altered by a substantive criminal statute. In fact, probable cause in any given context derives its content from the elements of the statute. If those elements do not give sufficient notice of what conduct is proscribed, the statute violates the Fifth Amendment, but it does not follow that the officer's conduct has offended the Fourth Amendment. The

lower court's confusion about the interests protected by the respective amendments resulted in its mistaken reliance upon the Fourth Amendment.

The court also declared that the standards of the ordinance were so vague that under no circumstances could it provide criteria to permit a reasonable man to believe that it may have been violated. We may assume, without conceding, that a statute may be so imprecise that every arrest which it purports to authorize would be unreasonable because there would exist no standards against which to measure the conduct of the arrestee. *Id.* In short, the standards would not merely be vague; they would be nonexistent. *Cf. Coates v. City of Cincinnati,* 402 U.S. 611, 614 (1971).

Yet the court of appeals was able to identify three criteria which were provided in the ordinance. 507 F.2d at 95-96; *cf. Palmer v. City of Euclid,* 402 U.S. 544 (1971). Such identification was inconsistent with its decision that the ordinance violated the Fourth Amendment. Furthermore, the district court found that respondent's conduct had satisfied these criteria, thereby giving rise to probable cause. The findings of the district court are, of course, entitled to great weight. *See Ker v. California,* 374 U.S. 23, 32 (1963); *Mapp v. Ohio, supra,* 367 U.S. at 653; *United States v. Rabinowitz,* 339 U.S. 56, 63 (1950), *overruled on other grounds in Chimel v. California,* 395 U.S. 752 (1969); *cf.* 28 U.S.C. 2254(d). We therefore submit, and the lower courts have concluded, that the vagrancy ordinance is not so lacking in standards that all arrests pursuant to its enforcement are unreasonable. Rather, the search of respondent—the only search



before this Court[6]—was justified by probable cause to believe that his conduct had satisfied the criteria of the ordinance.

### C. There Can Be Probable Cause To Believe That A Vague Statute Has Been Violated.

The foregoing discussion has implicitly assumed that a reasonable man may reasonably believe that a statute, subsequently declared vague, has been violated. Although that assumption contains a superficial inconsistency, analysis should resolve the paradox. A statute which is impermissibly vague under the Due Process Clause of the Fifth Amendment not only fails to give fair notice but lacks reasonably clear guidelines for triers of fact to apply to evidence adduced at trial. *See Smith v. Goguen, supra,* 415 U.S. at 573. It is conceptually impossible for a lay jury to find *beyond a reasonable doubt* that the imprecise elements of a statute have been violated. *See In re Winship,* 397 U.S. 358 (1970). However, evidence falling far short of the quantum necessary to convict can establish probable cause under the Fourth Amendment. Each element of the crime need not be established to permit a lawful arrest. *United States v. Ventresca,* 380 U.S. 102, 107 (1965).

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[6]The vagueness of the ordinance may result in invalid arrests of other persons. Indeed, any arrest without probable cause, even under a valid statute, violates the Fourth Amendment. But respondent cannot complain of the arrests of others (*cf. Wong Sun v. United States,* 371 U.S. 471, 491-92 [1963]), or of the application of a statute which may be vague only as to others. *See Parker v. Levy, supra,* 417 U.S. at 755-57; *Smith v. Goguen, supra,* 415 U.S. at 577-78 (dictum); Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. Pa. L. Rev. 67, 96-104 (1960).

Vagueness and probable cause are determined by the criteria and values of two different amendments. As a result, a "law may be so ill-defined as to leave the reasonable citizen guessing as to the conduct prohibited, yet sufficiently clear to enable a policeman with his increased legal sophistication to determine the scope of the law and the existence of probable cause." Comment, 47 N.Y.U.L. Rev., *supra,* at 601. "The subsequent determination that the statute under which the arrest was made was too imprecise to authorize conviction would seem irrelevant to a consideration of the legality of the arrest; that is, to hold an arrest illegal because made under a statute subsequently voided under the Fifth Amendment is, at best, a proposition of doubtful validity." Note, 18 Vill. L. Rev., *supra,* at 121.

This case presents a classic situation of obvious probable cause under an invalid statute. The facts and circumstances resulting in respondent's arrest have been stated in the Statement of Facts and in the order of the district court. (App. B to Petition for Writ of Certiorari at xviii-xix). Respondent was wandering aimlessly near the shopping center of Henderson, Nevada, early on a Sunday morning. Seeing Officer Lattin's marked police car, he walked away rapidly and did not stop when the officer directed him to halt. Although he gave his name and date of birth, he produced no identification to verify his representations, stating that it had been stolen. He could not or would not tell Officer Lattin how long or with whom he had been in Las Vegas; his explanation



about his ultimate destination was physically improbable. It was reasonable for Officer Lattin to believe that respondent had violated the ordinance:[7] he was wandering the streets, could not account for his presence in Henderson, and had no identification. The District Court found that there was probable cause to arrest. The search incidental to that arrest was proper. *Gustafson v. Florida,* 414 U.S. 260 (1973); *United States v. Robinson,* 414 U.S. 218 (1973); *Chimel v. California,* 395 U.S. 752 (1969).

**D. The Arrest Was Not A Pretext To Search.**

We recognize that vagrancy laws have often been enacted to permit arrests and searches of those suspected of more serious crimes for which probable cause to arrest is lacking. *See Papachristou v. City of Jacksonville, supra,* 405 U.S. at 169; *United States* ex rel. *Newsome v. Malcolm, supra,* 492 F.2d at 1172; *Hall v. United States, supra,* 459 F.2d at 838; Douglas, *Vagrancy and Arrest on Suspicion,* 70 Yale L.J. 1, 11-13 (1960); Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality,* 37 N.Y.U.L. Rev. 102, 129-30 (1962); Note, 47 N.Y. U.L. Rev., *supra,* at 595; Comment, 18 Vill. L. Rev., *supra,* at 118; *cf. Lewis v. City of New Orleans,* 415 U.S. 130, 136 (1974) (Powell, J., concurring). We further recognize that an arrest cannot be used as a pretext for a search. *United States v. Lefkowitz,* 285 U.S. 452, 467 (1932). Without pausing to consider whether all pretextual arrests based upon probable

[7] *See* n. 1, *supra.*

cause are invalid,[8] we submit that the record is devoid of any evidence that *this* arrest was a pretext for a search. Officer Lattin had no reason to suspect, and did not suspect, that respondent had committed a crime other than violating the vagrancy ordinance. Indeed, he was not aware of the shooting in San Bernardino on the previous evening. 507 F.2d at 95 n.2. Neither the court of appeals nor the district court found that the officer arrested respondent for any reason other than the stated basis. Whatever the motive of the City of Henderson in enacting the ordinance—and whatever the reasons that other officers may have for making other arrests under the ordinance—*this* arrest was not a pretext for a search. There can be no question about the good faith of the officer.

**E. No Recognized Purpose of the Exclusionary Rule Would Be Served By Exclusion of the Evidence.**

It appears from the foregoing that the arrest of respondent was made with probable cause and in good faith. Since the court of appeals declared unconstitutional the ordinance under which respondent was arrested, we are confronted with a legal anomaly: an arrest which is reasonable but unlawful, because not authorized by a valid state law. But "a search not expressly authorized by state law [may] be justified as a constitutionally reasonable one." *Cooper v. California,* 386 U.S. 58, 61 (1967). We must now inquire whether the *post hoc* condemnation of a presumptively valid and lawfully enacted ordinance compels the application of the exclusionary rule to the weapon found on respondent.

[8]Pretextual arrests of a person were often made in his home to permit a search of the entire premises. *Cf. United States v. Rabinowitz, supra,* 339 U.S. 56; *Harris v. United States,* 331 U.S. 145 (1947). In view of the overruling of *Rabinowitz* and *Harris* by *Chimel v. California, supra,* 395 U.S. at 768, the scope of the pretext doctrine is uncertain at best. *But see United States v. Robinson, supra,* 414 U.S. at 238 n.2 (Powell, J., concurring).



Prior to the decision of the court of appeals, the exclusionary rule had been justified on three grounds. *See* Note, *The Fourth Amendment Exclusionary Rule: Past, Present, No Future,* 12 Amer. Crim. L. Rev. 507, 508-12 (1975). First, to vindicate his right to privacy, the accused had a personal constitutional right to exclude evidence obtained as a result of unlawful searches and seizures directed against him. *See Mapp v. Ohio, supra,* 367 U.S. at 655-56; *Weeks v. United States, supra,* 232 U.S. at 392-94; Schrock and Welsh, *Up from* Calandra: *The Exclusionary Rule as a Constitutional Requirement,* 59 Minn. L. Rev. 251 (1974).

Second, exclusion of unlawfully seized evidence is necessary to deter police misconduct. *Brown v. Illinois,* 43 U.S.L.W. 4937, 4940 (1975); *United States v. Peltier,* 43 U.S.L.W. 4918, 4922 (1975); *Michigan v. Tucker,* 417 U.S. 433, 446 (1974); *United States v. Calandra,* 414 U.S. 338, 347 (1974); *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 413-15 (1971) (Burger, C. J., dissenting); *Kaufman v. United States,* 394 U.S. 217, 238 (1969) (Black, J., dissenting); *Desist v. United States,* 394 U.S. 244, 249-50, 251 (1969); *Linkletter v. Walker,* 381 U.S. 618, 636-37 (1965); *Mapp v. Ohio, supra,* 367 U.S. at 656; *Elkins v. United States, supra,* 364 U.S. at 217;

*People v. Cahan,* 44 Cal.2d 434, 448, 282 P.2d 905 (1955); Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. Chi. L. Rev. 665, 668-71 (1970) [hereinafter cited as Oaks].

Third, exclusion of unlawfully seized evidence has been deemed necessary to preserve the judicial integrity of the court before which the defendant is being tried. *E.g., Lee v. Florida,* 392 U.S. 378, 385 (1968); *Terry v. Ohio,* 392 U.S. 1, 12 (1968); *Elkins v. United States, supra,* 364 U.S. at 222; *Olmstead v. United States,* 277 U.S. 438, 470, 484-85 (1928) (Holmes and Brandeis, J. J., dissenting); *see generally* Note, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule,* 20 U.C.L.A. L. Rev. 1129 (1973).

This Court has repudiated the personal right theory. "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim: '[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late'. *Linkletter v. Walker,* 381 U.S. 618, 637 (1965)." *United States v. Calandra, supra,* 414 U.S. at 347; *accord, United States v. Peltier, supra,* 43 U.S.L.W. at 4921. It remains to be considered whether the purposes of deterrence or judicial integrity would be served by the exclusion of evidence in this case.

Before applying the exclusionary rule, a remedial device not expressly mentioned in the Fourth Amendment, this Court—or any court—must balance its costs against its benefits. *See United States v. Calandra, supra,* 414 U.S. at 348-51; Kaplan, *The Limits of The*



*Exclusionary Rule,* 26 Stan. L. Rev. 1027, 1032-35 (1974). Typically, the competing interests are the value to society of deterring future police misconduct and the cost of freeing without punishment a defendant whose guilt is proven by the suppressed evidence. Note, 20 U.C.L.A. L. Rev., *supra,* at 1149. When the cost is greater than the benefit, the evidence is not excluded. *United States v. Calandra, supra.* It is therefore necessary to assess the deterrent effect of the exclusion of the evidence in this case. "Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose." *Michigan v. Tucker, supra,* 417 U.S. at 446.

"The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. . . . Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." *Id.* at 447; *accord, Brown v. Illinois, supra,* 43 U.S.L.W. at 4944 (Powell, J., concurring); *United States v. Peltier, supra,* 43 U.S.L.W. at 4921.

We submit that *United States v. Peltier, supra,* provides compelling authority for the proposition that the deterrence rationale could not possibly be served in this case. In *Peltier,* Government agents had conducted a species of search subsequently condemned by this Court in *Almeida-Sanchez v. United States, supra,* 413 U.S. 266. The question for decision was whether the ruling in *Almeida-Sanchez* should apply to searches conducted before the decision in that case.

Holding that no useful purpose could be served by a retroactive application of *Almeida-Sanchez,* this Court made the following observations which are virtually controlling in the case at hand:

> "It was *in reliance upon a validly enacted statute,* supported by longstanding administrative regulations and continuous judicial approval, that border patrol agents stopped and searched respondent's automobile. Since the parties acknowledge that *Almeida-Sanchez* was the first roving border patrol case to be decided by this Court, *unless we are to hold that parties may not reasonably rely upon any legal pronouncement emanating from sources other than this Court, we cannot regard as blameworthy those parties who conform their conduct to the prevailing statutory or constitutional norm.* [Citations omitted.] *If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge,* or may properly be charged with knowledge, *that the search was unconstitutional under the Fourth Amendment.* Admittedly this uniform treatment of roving border patrol searches by the federal judiciary was overturned by this Court's decision in *Almeida-Sanchez.* But in light of this history and of what we perceive to be the purpose of the exclusionary rule, we conclude that nothing in the Fourth Amendment, or in the exclusionary rule fashioned to implement it, requires that the evidence here be suppressed, even if we assume that respondent's Fourth Amendment rights were violated by the search of his car." 43 U.S.L.W. at 4922 (emphasis added; fns. omitted).



It is true that the Henderson vagrancy ordinance had never been approved judicially, as had the statute in *Peltier,* but neither had it been condemned until December 4, 1974, almost seven years after the arrest of respondent. Officer Lattin's reasonable and good-faith reliance upon the validity of the ordinance totally undermines any attempt to rationalize the suppression of evidence on the grounds of deterrence. "Police conduct authorized by a statute which may be unconstitutional, will not be deterred . . . because the police cannot foresee which of the statutes that govern their conduct will be invalidated in the future." Note, 47 N.Y.U.L. Rev., *supra,* at 604. Therefore, deterrence of future unlawful police conduct, the exclusionary rule's "prime purpose" (*United States v. Calandra, supra,* 414 U.S. at 347), will not be served by suppression in this case.[9]

Ideally, police should be encouraged to rely on the coordinate branches of government whenever possible while "engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States, supra,* 333 U.S. at 14. Typically, police are asked to rely upon the assessment of the judiciary in determining

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[9]Justice Powell has described an arrest under a statute subsequently declared unconstitutional as a mere "technical" violation of the Fourth Amendment. In such a situation, "the deterrence rationale of the exclusionary rule does not obtain, and I can see no legitimate justification for depriving the prosecution of reliable and probative evidence." *Brown v. Illinois, supra,* 43 U.S.L.W. at 4944 (concurring opinion). Just as an officer who has made a reasonable mistake of fact should not be penalized by the application of the exclusionary rule (*Hill v. California,* 401 U.S. 797, 804 [1971]), the same conclusion should obtain when a policeman has reasonably—but mistakenly—assumed the validity of the law under which he has made an arrest.

whether probable cause exists to conduct a search. *E.g., United States v. Ventresca, supra,* 380 U.S. 102. In this case, the officer relied upon the presumptive validity of the legislative determination that the facts which he perceived amounted to an offense against society. Suppression of evidence seized under authority of a warrant later invalidated will not deter police misconduct (*cf. Brown v. Illinois, supra,* 43 U.S.L.W. at 4944 [Powell, J., concurring]); the same must be said of arrests under statutes later held unconstitutional, and for the same reason. The officer's reasonable reliance upon another branch of the government is not misconduct. Indeed, to the extent that suppression discourages such reliance, the exclusionary rule has a negative impact upon law enforcement and civil liberties.

But the court of appeals relied upon two other rationales, one of which has been recognized by this Court: the "imperative of judicial integrity." Many things may be said about this nebulous concept, few of them favorable. It is inconsistent with the other Fourth Amendment precedents of this Court in at least seven respects. First, the requirement that the defendant have "standing" to object to the search (*e.g., Alderman v. United States,* 394 U.S. 165, 173-76 [1969]; *Jones v. United States,* 362 U.S. 257, 261 [1960]), permits illegally seized evidence to be admitted against a defendant who does not satisfy the requirement. The result in that the court admitting the evidence has "dirtied its hands" and thereby sullied its integrity. *See* Note, 12 Amer. Crim. L. Rev.,



*supra,* at 514. Second, a defendant illegally arrested —even kidnaped—may be validly convicted despite the unlawful nature of his seizure. *Gerstein v. Pugh,* 420 U.S. 103, 119 (1975); *Frisbie v. Collins,* 342 U.S. 519 (1952); Oaks, *supra,* at 669.

Third, evidence seized unlawfully by private citizens is admissible in a criminal trial. *Burdeau v. McDowell,* 256 U.S. 465 (1921). Fourth, illegally obtained evidence may be used to impeach a witness, including the defendant. *Walder v. United States,* 347 U.S. 62 (1954); *cf. Harris v. New York,* 401 U.S. 222 (1971). Fifth and sixth, both the doctrines of "attenuation" (*Wong Sun v. United States,* 371 U.S.471, 487-88 [1963]) and harmless error (*Chapman v. California,* 386 U.S. 18 [1967]) are applicable to illegally seized evidence. Thus, a court may permit its integrity to be compromised as long as it does not prejudice the defendant, thus confusing his rights with its obligations. *See* Kaplan, 26 Stan. L. Rev., *supra,* at 1030. Finally, this Court's decision to hold prospective in application *Mapp v. Ohio, supra,* (*Linkletter v. Walker, supra,* 381 U.S. 618) "in effect, ratified police violations of the Fourth Amendment occurring after that amendment was made applicable to the states through the Fourteenth Amendment [in *Wolf v. Colorado*]." Note, 12 Amer. Crim. L. Rev., *supra,* at 514.

Not only have the exceptions undermined the rule, the concept itself, which has never been invoked by this Court as the sole justification to suppress evidence (Oaks, *supra,* at 669), rests upon a questionable view of the judicial process and its responsibility to

society. "The weakness of the judicial integrity argument is that it asks us to be guided by what seems like judicial squeamishness; or, failing that, it asks us to engage in speculation about the remote consequences of judicial complicity in lawless governmental action." Schrock and Welsh, 59 Minn. L. Rev., *supra,* at 265. Viewed as an end in itself, judicial integrity permits a court to protect its purity by suppressing truth and permitting a guilty defendant to go free. "Is not the court which excludes evidence in order to avoid condoning the acts of the officer by the same token condoning the illegal acts of the defendant?" Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan,* 43 Calif. L. Rev. 565, 582 (1955).

If suppression of illegally seized evidence is seen as a method of teaching by example (*Olmstead v. United States, supra,* 277 U.S. at 485 [Brandeis, J., dissenting]) or of "minimizing the risk of seriously undermining popular trust in government" (*United States v. Calandra, supra,* 414 U.S. at 357 [Brennan, J., dissenting]), then the justification for judicial integrity is speculative. "If proponents of the exclusionary rule say judicial lawlessness is a societal menace, the rejoinder is, why not risk that menace rather than the far worse danger of lawlessness in the streets?" Schrock and Welsh, 59 Minn. L. Rev., *supra,* at 266.

A more fundamental objection to the doctrine than its dubious premises is its questionable legal foundation. We have searched the Constitution in vain for the provision which entitles this Court to instruct all



other tribunals to defend their integrity by excluding relevant evidence. Of course this Court has inherent supervisory power to direct lower federal courts to abstain from participating in the "dirty business" of police misconduct. *Cf. McNabb v. United States,* 318 U.S. 332 (1943); *see generally* Hill, *The Bill of Rights and The Supervisory Power,* 69 Colum. L. Rev. 181, 193-99 (1969). Indeed, in *McNabb,* one of the earliest cases to invoke the supervisory power, this Court stated that "a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand *without making the courts themselves accomplices in willful disobedience.*" 318 U.S. at 345 (emphasis added). It is significant that the italicized language, having the ring associated with the invocation of the doctrine of judicial integrity, is found in a decision which is so closely identified with the concept of supervisory power.

Justice Brandeis's dissent in *Olmstead* provides further support for the position that judicial integrity has its origin in this Court's supervisory power. After arguing eloquently that the conduct at bench was a search in the constitutional sense (277 U.S. at 471-79), he then declared: "*Independently of the constitutional question,* I am of opinion that the judgment should be reversed." *Id.* at 480 (emphasis added). What followed was his classic discourse about the duty of the courts to protect their integrity and promote confidence in the administration of justice by rejecting evidence seized in violation of state law. *Id.* at 480-85.

It is clear that Justice Brandeis implicitly believed that federal courts had the inherent power, independent of the Constitution, to protect themselves from tainted evidence. *See* Note, *The Supervisory Power of the Federal Courts,* 76 Harv. L. Rev. 1656, 1663 (1963). Finally, it is worthy of note that the phrase, "the imperative of judicial integrity," was coined in a decision which rested on this Court's supervisory power. *Elkins v. United States, supra,* 364 U.S. at 216, 222.

We therefore suggest that this Court may invoke its supervisory power to cleanse the hands of federal courts. But since it has no supervisory power over state courts (*Ker v. California, supra,* 374 U.S. at 31; *Mapp v. Ohio, supra,* 367 U.S. at 678 [Harlan, J. dissenting]), we respectfully submit that this Court has not the power to instruct those tribunals to protect their integrity. The doctrine of judicial integrity can have no relevance to a consideration of the legality of a search whose fruits are admitted in state courts.

Even conceding the applicability of the doctrine to state cases, we question the extent of its present vitality. The dissenters in *Calandra* feared that "the Court today discounts to the point of extinction the vital function of the rule that the judiciary avoid even the silghtest appearance of sanctioning illegal government conduct." 414 U.S. at 360. The majority's implicit premise that deterrence and judicial integrity are inextricably intertwined (*id.* at 356 n. 11) was expressly stated in *Michigan v. Tucker, supra,* 417 U.S. at 450 n. 25: "This rationale [of judicial integrity],



however, is really an assimilation of the more specific rationales discussed in the text of this opinion, and does not in their absence provide an independent basis for excluding challenged evidence." Thus, judicial integrity has been subsumed in the more plausible rationale of deterrence. Despite references to judicial integrity by the majority in *Peltier* (43 U.S.L.W. at 4920-21) and the hopeful endorsement by the dissenters (*id.* at 4925 n. 13), it should now be clear that *"the purpose* of the exclusionary rule is to deter unlawful police conduct . . . ." *Id.* at 4922 (emphasis added).

To the extent that the imperative of judicial integrity is viable at all, *Peltier* makes it clear that it does not compel suppression of evidence in this case. That rationale "is also not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law even if decisions subsequent to the search and seizure have held that the conduct of the type engaged in by law enforcement officials is not permitted by the Constitution." *Id.* at 4920. Given the good-faith and reasonable reliance by Officer Lattin upon the presumptive validity of the vagrancy ordinance, it is manifest that judicial integrity was not offended by the admission of the fruits of the search into evidence at trial.

**F. The Exclusionary Rule Should Not Be Employed To Deter Legislatures From Enacting Unconstitutional Statutes.**

The court of appeals rested its decision not only upon the imperative of judicial integrity but upon the need to deter legislatures from enacting unconsti-

tutional statutes. 507 F.2d at 98; *accord, Comment,* 47 N.Y.U.L. Rev., *supra,* at 602. This rationale must fail for the following reasons. First, it is totally without support from the decisions of this Court, discussed in Part E of this Argument. Second, the exclusionary rule was fashioned to effectuate the provisions of the Fourth Amendment, which is aimed at police misconduct, not legislative misjudgment (See Part B). Finally, it is important to recognize that this Court decided *Mapp* only after other means of enforcing the Fourth Amendment had proved futile. 367 U.S. at 651-52; *accord, People v. Cahan, supra,* 44 Cal.2d at 445; *compare Wolf v. Colorado, supra,* 338 U.S. at 31, *with id.* at 41-46 (Murphy, J., dissenting).

By contrast, legislatures may be "deterred" from enacting invalid measures simply by attacking their constitutionality. A person convicted under an unconstitutional criminal statute may attack his conviction and the statute in state appellate courts and by appeal to this Court. 28 U.S.C. § 1257(2). He may then attack his conviction in federal court by means of a petition for writ of habeas corpus. *Id.* § 2254(a). Furthermore, any person even threatened with prosecution under a statute whose validity is in dispute may seek declaratory relief in federal court.[10] ***E.g.,*** *Steffel v. Thompson,* 415 U.S. 452 (1974).

It is therefore unnecessary to utilize the drastic remedial device of the exclusionary rule when there

[10]In Nevada, it is possible to seek a declaratory judgment regarding the validity of a municipal ordinance. Nev. Rev. Stats. 30.040 (1973).



are numerous and equally effective alternatives. Furthermore, and wholly aside from the dubious proposition that there is a rational relationship between exclusion of reliable evidence from a prosecution under a valid statute and deterrence of an occasional enactment of an invalid measure, we contend exclusion could not have any deterrent impact on the governing body of Henderson, Nevada. Respondent was tried and convicted in California for violation of a California law; the reversal of his conviction and possible release would be of no concern to Nevada legislators. The opinion of the court of appeals, holding to the contrary, is unsupportable.

### G. Suppression of Evidence Is Not Compelled By the Case-or-Controversy Requirement.

It may be argued that the reasonable and good-faith reliance upon a presumptively valid statute should preclude suppression of evidence discovered during the course of other arrests made under the ordinance prior to December 4, 1974, but that respondent should receive the benefit of his own decision. We recognize that this Court can only decide concrete cases or controversies (U.S. Const. Art. III, § 2; *Stovall v. Denno,* 388 U.S. 293, 401 [1967]) and cannot issue advisory opinions. *See, e.g., Muskrat v. United States,* 219 U.S. 346 (1911). However, this rule does not compel suppression of evidence.

Four distinct questions were decided by the court of appeals: (1) Was the ordinance constitutional? (2) Were the arrest and search unlawful? (3) Did the illegality of the arrest and search demand the

activation of the exclusionary rule? (4) If admission of the evidence was error, was it harmless? If the court had declared the ordinance to be unconstitutional but had failed to discuss the relevance of that declaration to respondent's rights, the opinion would have been advisory and in violation of the Constitution. Once the court had held that the arrest and search of *respondent* were unlawful because of the invalidity of the ordinance, it had then satisfied the case-or-controversy requirement.

The decision that the arrest was unlawful, of course, does not invariably lead to the conclusion that evidence must be suppressed. *Cf. United States v. Calandra, supra.* The third issue may be resolved in one of two ways: The evidence should have been suppressed, as the court of appeals held; or it was properly admitted, as we have contended. Either resolution is permissible in the context of the case-or-controversy requirement because either has a direct bearing upon the ultimate issue of the relief to which respondent is entitled. If the evidence was properly admitted, the writ of habeas corpus was properly denied. If the evidence should have been excluded and was prejudicial (see Argument IV), the writ should have been granted.

We therefore submit that, consistent with the case-or-controversy requirement, this Court may properly hold that the search of respondent was unlawful but that the illegality did not require exclusion of the evidence. The writ therefore was properly denied.

It is true that there was reliance upon the statutes at issue in *Almeida-Sanchez v. United States, supra;*



*Coolidge v. New Hampshire, supra;* and *Berger v. New York, supra,* but that in each case the defendant's conviction was reversed. However, there is no indication in those opinions that the respective respondents urged this Court to affirm the judgments because of the good-faith reliance upon the statutes by the officers. *Cf. United States v. Peltier, supra,* 43 U.S.L.W. at 4922 n. 12 (no "considerations of exclusionary rule policy independent of the merits of the Fourth Amendment question" urged). The respondents in those cases must have assumed that violation of the Fourth Amendment, even if reasonable and in good faith, required suppression of the evidence. We have questioned that assumption and have argued that it is invalid in this case. The evidence, seized in reliance upon the decision—in the form of an ordinance—of a coordinate branch of the government, was properly admitted.

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## II

### FEDERAL HABEAS CORPUS SHOULD NOT BE AVAILABLE TO RELITIGATE THE VALIDITY OF A FOURTH AMENDMENT CLAIM MADE BY A STATE PRISONER.

#### A. Kaufman v. United States Should Be Overruled.

This Court has stated expressly (*Kaufman v. United States,* 394 U.S. 217, 225-27 [1969]), and held implicitly (*e.g., Whiteley v. Warden,* 401 U.S. 560 [1971]); *Harris v. Nelson,* 394 U.S. 286 [1969]; *Mancusi v. DeForte,* 392 U.S. 364 [1968]; *Carafas v. LaVallee,* 391 U.S. 234 [1968]; *Warden v. Hayden,* 387 U.S. 294 [1967]), that a Fourth Amendment claim by

a state prisoner is cognizable on federal habeas corpus. It is now time to reconsider and overrule those decisions.

It is not the purpose of this Argument to review the debate over the history, purpose, and scope of federal habeas corpus. Elaborate and scholarly discussions can be found elsewhere. *Compare Fay v. Noia,* 372 U.S. 391, 399-426 (1963), *with id.* at 449-63 (Harlan, J., dissenting); *compare Developments in The Law—Federal Habeas Corpus,* 83 Harv.L.Rev. 1038, 1042-62, 1263-74 (1970), *and* Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding,* 74 Harv.L.Rev. 1315, 1324-1332 (1961), *with* Oaks, *Legal History in the High Court—Habeas Corpus,* 64 Mich. L.Rev. 451, 451-68 (1966), *and* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv.L.Rev. 441, 463-507 (1963) [hereinafter cited as Bator]. "The scope of federal habeas corpus for state prisoners has evolved from a quite limited inquiry into whether the committing state court had jurisdiction, [Citations omitted.], to whether the applicant had been given an adequate opportunity in state court to raise his constitutional claims, [Citation omitted.]; and finally to actual redetermination in federal court of state court rulings on a wide variety of constitutional contentions . . . ." *Schneckloth v. Bustamonte,* 412 U.S. 218, 255-56 (1973) (Powell, J., concurring). Rather, the focus of the present inquiry is whether the benefits to society and the prisoner in permitting Fourth Amendment claims to be raised on federal habeas corpus justify the resulting costs.



"The provision of federal collateral remedies rests more fundamentally upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief." *Kaufman v. United States, supra,* 394 U.S. at 226. Without questioning the wisdom of this stated purpose of the writ (*see* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U.Chi.L.Rev. 142, 162 [1970] [hereinafter cited as Friendly]), we contend that it is inapplicable to claims that the state courts erred in failing to suppress evidence. The purpose of the writ is to determine whether the violation of personal constitutional rights resulted in the deprivation of liberty. *See Fay v. Noia, supra,* 372 U.S. at 405, 409, 424. "Vindication of due process is precisely its historic office." *Id.* at 402. But a defendant has no personal right to the suppression of evidence; that is a societal right. *United States v. Calandra, supra,* 414 U.S. at 347; *Linkletter v. Walker, supra,* 381 U.S. at 637. Thus, a federal court can order that unlawfully seized evidence be suppressed only if society has an interest in suppression.

The cost to society of relitigation of constitutional claims on federal habeas corpus is obvious. The disposition of habeas petitions taxes judicial resources (*Schneckloth v. Bustamonte, supra,* 412 U.S. at 259-61; Friendly, *supra,* at 148), and causes friction between federal courts and the state judiciaries whose decisions are second-guessed. *Schneckloth v. Bustamonte, supra,* at 263-65; Bator, *supra,* at 451; *contra,*

Note, *Federal Habeas Corpus for State Prisoners and the Fourth Amendment,* 52 N.Car.L.Rev. 633, 641-42 (1974). Unlimited availability of habeas corpus undermines the deterrent and rehabilitative functions of the criminal law:

> "The first step in achieving [those aims] may be a realization by the convict that he is justly subject to sanction, that he stands in need of rehabilitation; and a process of reeducation cannot, perhaps, even begin if we make sure that the cardinal moral predicate is missing, if society itself continuously tells the convict that he may not be justly subject to reeducation and treatment in the first place. The idea of just condemnation lies at the heart of the criminal law, and we should not lightly create processes which implicitly belie its possibility." Bator, *supra,* at 452; *accord, Schneckloth v. Bustamonte, supra,* at 262; *Sanders v. United States,* 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting); Friendly, *supra,* at 146.

The endless possibility of federal collateral relief tends to defeat society's interest in finality of litigation. One aspect of this interest is the maintenance of the deterrent and rehabilitative qualities of the penal sanction, as explained above. Professor Amsterdam has identified other finality considerations:

> "They involve (a) duplication of judicial effort; (b) delay in setting the criminal proceedings at rest; (c) inconvenience and possibly danger in transporting a prisoner to the sentencing court for hearing; (d) postponed litigation of fact, hence litigation which will often be less reliable in reproducing facts (i) respecting the postconviction claim itself, and (ii) respecting the issue of guilt if the collateral attack succeeds in a form which allows retrial (the burden of proof of guilt on retrial, of course, remaining with the prosecutor). In combination, these finality considerations amount to a more or less persuasive argument against the cognizability of any particular collateral claim, *the strength of the argument depending upon the nature of the claim,* the manner of its treatment (if any) in the conviction proceedings, and the circumstances under which collateral litigation must be had." Amsterdam, *Search, Seizure, and Section 2255: A Comment,* 112 U.Pa.L.Rev., 378, 383-84 (1964) (emphasis added).



To the above must be added the more abstract, but no less vital, interest in repose, "a psychological necessity in a secure and active society. . . ." Bator, *supra,* at 452.

Society must bear these costs if the alleged constitutional error affects the integrity or reliability of the fact-finding process (*e.g., Bruton v. United States,* 391 U.S. 123 [1968]; *Gideon v. Wainwright,* 372 U.S. 335 [1963]); if the nature of the violation made it impossible to raise the issue in state proceedings (*e.g., Waley v. Johnston,* 316 U.S. 101 [1942] [coerced plea of guilty]; *Mooney v. Holohan,* 294 U.S. 103 [1935] [knowing use of perjured testimony]; Bator, *supra,* at 455-60); if the state does not provide an adequate corrective process (*cf. Frank v. Mangum,* 237 U.S. 309 [1915]); and, perhaps, if the claim of constitutional error is supplemented with a "colorable claim of innocence" (Friendly, *supra,* at 142, 151-57, 170). But

most search and seizure questions do not fall into any of the above categories. The evidence is reliable and probative of guilt. As the evidence is introduced at trial, there is opportunity to object to its admission; and, in California, there is a manifestly adequate corrective process. *See* Cal.Pen.Code § 1538.5. Application of the exclusionary rule on federal habeas corpus can be justified only if its costs are less than the benefits which society derives from its deterrent effect.

"[T]he case for collateral application of the rule is an anemic one. On collateral attack, the exclusionary rule retains its major liabilities while the asserted benefit of the rule dissolves. For whatever deterrent function the rule may serve when applied on trial and appeal becomes greatly attenuated when, months or years afterward, the claim surfaces for collateral review. The impermissible conduct has long since occurred, and the belated wrist slap by federal courts harms no one but society on whom the convicted criminal is newly released." *Schneckloth v. Bustamonte, supra,* 412 U.S. at 268-69; *accord, Kaufman v. United States, supra,* 394 U.S. at 238-39 (Black, J., dissenting); *cf. In re Sterling,* 63 Cal.2d 486, 487-88, 407 P.2d 5, 7, 47 Cal.Rptr. 205, 207 (1965) (Traynor, C.J.). Professor Amsterdam has stated the matter succinctly: "As the exclusionary rule is applied time after time, it seems that its deterrent efficacy at some stage reaches a point of diminishing returns, and beyond that point its continued application is a public nuisance." Amsterdam, 112 U.Pa.L.Rev., *supra,* at 389.



We pointed out in Argument I-E that a court may apply the exclusionary rule only if the social benefits are greater than the attendant costs. In the context of federal habeas corpus, the costs, in terms of judicial resources, prisoner rehabilitation, duplication of effort, reliability of belated litigation, federal-state harmony and the freeing of guilty men, are apparent and astronomical. The benefits—that the police officer who conducted the search years before will be deterred from future misconduct—are speculative and minimal. To the extent that *Kaufman* and cases citing it hold that the search and seizure claims of state prisoners are cognizable on federal habeas corpus, they should be overruled.[11]

**B. A Search Made In Reliance Upon A Coordinate Branch Of Government Should Not Be Relitigated On Federal Habeas Corpus.**

In the preceding section we argued that no state prisoner, who has had the opportunity to litigate the merits of a search or seizure in state court, should be permitted to relitigate the merits on federal habeas corpus. This Court has asked counsel to consider the narrower question whether the validity of *this* search is an issue cognizable under 28 U.S.C. ~~§ 2254.~~ We suggest the following principle: The availability of federal relief should be dependent

[11]It is doubtful that the views stated in *Kaufman* now command a majority of this Court. *See Cardwell v. Lewis,* 417 U.S. 583, 596 (1974) (Powell, J., concurring); *Schneckloth v. Bustamonte, supra,* 412 U.S. at 249, 250-75 (Blackmun, Powell, and Rehnquist, J.J., and Burger, C.J., concurring); *Chambers v. Maroney,* 399 U.S. 42, 54-55 (1970) (Stewart, J., concurring); *Kaufman v. United States, supra,* 394 U.S. at 242-43 (Stewart, J., dissenting).

upon the extent to which a search has deviated from the norms of due process. A "technical" violation, committed reasonably and in good faith, should not be cognizable on federal habeas corpus. At the other end of the spectrum are searches which are flagrantly abusive of the Fourth Amendment rights. Deterrence in these cases is more likely to be effective; hence, collateral attacks may be justified.

In his concurring opinion in *Brown v. Illinois, supra,* Justice Powell argued forcefully that the reach of the doctrine of "fruit of the poisonous tree" should depend upon the nature of the Fourth Amendment violation: "In my view, the point at which the taint can be said to have dissipated should be related . . . to the nature of the taint." 43 U.S.L.W. at 4943. Thus, all evidence ultimately discovered as a result of an arrest which was physically abusive *(cf. Rochin v. California,* 342 U.S. 165 [1952]) would be excluded in the absence of "some demonstrably effective break in the chain of events leading from the illegal arrest" to the evidence. 43 U.S.L.W. at 4944. However, an arrest "pursuant to a statute that is subsequently declared unconstitutional" is a "technical" violation that calls for correspondingly less exclusion. *Id.* The decision regarding the extent of exclusion should be made "with the deterrent purpose of the Fourth Amendment exclusionary rule sharply in focus." *Id.*

The principle espoused by Justice Powell, that there is a relationship between the nature of the violation and the need for deterrence, is equally applicable here. Suppression of evidence found during a



search conducted in reliance on a warrant later invalidated will have little, if any, deterrent effect because the conduct of the officer was exemplary. If anything, it may discourage the use of search warrants. In seeking a warrant the officer has done what this Court repeatedly has told him to do. Similarly, it is not misconduct to make an arrest under a statute subsequently struck down, because the officer has reasonably relied upon its presumptive validity. In this situation, also, the case for the exclusionary rule on direct review is weak. On collateral review there is no case at all. Police officers, puzzled that evidence seized under a warrant was suppressed on appeal, would be startled if relief is granted on habeas. Worse yet, they probably would not care. The defendant having been convicted so long ago, it is unlikely that anyone would remember him or be concerned about his ultimate release. Therefore, the availability of habeas relief should be foreclosed for the same reason that rule of *Wong Sun (Wong Sun v. United States, supra,* 371 U.S. at 487-88) should be strictly applied. The deterrent effect of the exclusionary rule vanishes at a point close in time to the search. Exclusion of evidence is useless beyond that point.

By contrast, a physically brutal arrest and search or the ransacking of a house without probable cause or a warrant are examples of flagrant police misconduct. The case for the exclusionary rule is more convincing. Police must be taught that such conduct is intolerable. No one seriously doubts that evidence

seized in wanton violation of Fourth Amendment rights should be suppressed. Friendly, *The Bill of Rights as a Code of Criminal Procedure,* 53 Cal.L. Rev. 929, 951-953 (1965); Wright, *Must the Criminal Go Free if the Constable Blunders?,* 50 Tex.L.Rev. 736, 743-45 (1972). If a conviction based upon evidence seized without any colorable claim of authority survives a direct appeal, it is arguable that federal habeas corpus should be available. If it were not, an occasional police officer might believe that he could engage in such offensive conduct with impunity. In sum, it is possible that there would be deterrent value of the setting aside of such a conviction on federal habeas corpus.[12]

Applying the foregoing analysis to the instant case, it is manifest that the arrest of respondent was, at most, a technical violation—which occurred seven and one-half years ago. Exclusion of evidence will have no effect on Officer Lattin, who probably does not remember respondent. If the exclusionary rule "is aimed at effecting the wider audience of all law

[12]We recognize that there exist myriad intermediate situations in which the good or bad faith of the police officer may not be readily apparent. This uncertainty could make difficult the administration of the above principle (Kaplan, 26 Stan.L.Rev. *supra,* at 1045, 1048, n. 106), but that is true of any new broad rule—including the present exclusionary rule. We are confident that federal courts, charged to act "as law and justice require" (28 U.S.C. § 2243), could formulate workable guidelines to facilitate a predictable and principled application of this standard. As this rule would not yet be available to state courts, no danger exists that state courts could cynically employ it to compromise the interests of society in the enforcement of the Fourth Amendment. *Compare Kaufman v. United States, supra,* 394 U.S. at 225, *with Schneckloth v. Bustamonte, supra,* 412 U.S. at 260 n. 13 (Powell, J., concurring).



enforcement officials and society at large" (Oaks, *supra,* at 710; *United States v. Peltier, supra,* 43 U.S.L.W. at 4926 [Brennan, J., dissenting]), then Officer Lattin's colleagues—and all police officers—will hesitate to enforce a law which has not yet passed constitutional muster in the courts. It is inconceivable and unacceptable that the Fourth Amendment would forbid an officer to discharge his duty. We therefore submit that federal habeas corpus should not be available in this species of case.

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## III

### THE VAGRANCY ORDINANCE OF HENDERSON, NEVADA, IS NOT UNCONSTITUTIONALLY VAGUE.

Before discussing the constitutionality of the vagrancy ordinance, we observe that this Court need not decide that question. The applicability of the exclusionary rule in this case does not depend upon the validity of the ordinance. As explained in Argument I, the evidence was properly admitted even if the ordinance was unconstitutional. As discussed in Argument II, even if the evidence was improperly admitted, that issue should not be relitigated on federal habeas corpus. Thus, for either or both of the above reasons, this Court should reverse the judgment of the court of appeals. Any decision regarding the validity of the ordinance is unnecessary under what we believe to be proper analysis and disposition of this case. This Court should therefore decline to

pass upon this extraneous constitutional question. *Bowen v. United States,* 43 U.S.L.W. 5024, 5025 (1975); *United States v. Raines,* 362 U.S. 17, 21 (1960); *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

Vague statutes violate due process of law because they offend several important values. First, they fail to give fair notice to a person that his contemplated conduct is forbidden by the statute. *Parker v. Levy,* 417 U.S. 773, 752 (1974); *Smith v. Goguen,* 415 U.S. 566, 572 (1974); *Lanzetta v. New Jersey,* 306 U.S. 451, 453 (1939). "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harriss,* 347 U.S. 612, 617 (1954); *Palmer v. City of Euclid,* 402 U.S. 544, 546 (1971). Second, impermissibly vague statutes may result in arbitrary and discriminatory enforcement by law enforcement officials and triers of fact. *Smith v. Goguen, supra,* 415 U.S. 572-73; *Grayned v. City of Rockford,* 408 U.S. 104, 108-09 (1972); *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972); *United States v. Reese,* 92 U.S. 214, 221 (1876); Comment, *Recent Supreme Court Developments of the Vagueness Doctrine,* 7 Conn.L.Rev. 94, 100-05 (1974). Third, such a statute may "abut upon sensitive areas of basic First Amendment freedoms," operating "to inhibit the exercise of [those] freedoms. . . ." *Baggett v. Bullitt,* 377 U.S. 360, 372 (1964); *see* Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U.Pa.L.Rev. 67, 75 (1960); Comment, 7 Conn.L.Rev., *supra,* at 105-15.



Nevertheless, "lack of precision is not itself offensive to the requirements of due process." *Roth v. United States,* 354 U.S. 476, 491 (1957). "[T]he Constitution does not require impossible standards." *United States v. Petrillo,* 132 U.S. 1, 7 (1947). "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal fense. . . ." *Id.* at 8; *Miller v. California,* 413 U. S. 15, 28 n. 10 (1973). "[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury estimates it, some matter of degree." *Nash v. United States,* 229 U.S. 373, 377 (1913). A jury may be asked to determine whether conduct is "reasonable." *See United States v. Ragen,* 314 U.S. 513, 523 (1942). Although this Court requires a precise statute proscribing specific conduct where First Amendment interests are affected (*see Grayned v. City of Rockford, supra,* 408 U.S. at 109, n, 5; *Smith v. California,* 361 U.S. 147, 151 [1959]), this "Court goes far to uphold state statutes that deal with offenses, difficult to define, when they are not entwined with limitations on free expression." *Winters v. New York,* 333 U.S. 507, 517 (1948).

Finally, it is important to recognize that "there are statutes that by their terms or as authoritatively construed apply without question to certain activities, but whose application to other behavior is uncer-

tain." *Smith v. Goguen, supra,* 415 U.S. at 577-78. A person "who has received fair warning of the criminality of his own conduct from the statute in question is [not] entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy, supra,* 417 U.S. at 756.

The Court of Appeals identified three elements defined by the ordinance: (1) loitering or wandering on the streets without apparent reason or business; (2) refusal to identify himself or account for his presence; and (3) circumstances indicating to a reasonable man that identification is necessary to public safety. 507 F.2d at 95. With regard to the second element, this Court has held such a criterion is sufficiently precise and is satisfied by contradictory explanation for one's presence on the streets. *Palmer v. City of Euclid, supra,* 402 U.S. at 545. The third element is permissible under this Court's decision in *Terry v. Ohio, supra,* 392 U.S. at 20-21, which permits an officer to act when information of which he is aware would warrant the belief of a reasonable man that official intrusion is appropriate. Under the ordinance, "a peace officer is entitled to act when the surrounding circumstances indicate to a reasonable man that the public safety demands identification. We see no essential difference between the two formulations." *People v. Solomon,* 33 Cal.App.3d 429, 435, 108 Cal.Rptr. 867, 870 (1973). Arbitrary enforcement is forbidden by the objective requirement of reasonableness. *Id.*



Although the first element of "loitering without apparent reason" might be vague under certain circumstances (*cf. Papachristou v. City of Jacksonville, supra,*) respondent cannot take legal advantage of that possibility. *Cf. Parker v. Levy, supra.* Respondent's conduct—his quick movements upon seeing a police officer, his peering over his shoulder at the officer several times, his refusal to acknowledge the officer's attempts to gain his attention—was highly suspicious, clearly indicating that respondent had not lawful or apparent purpose in Henderson, Nevada. As to him, the ordinance was manifestly not vague.[13]

[13]The constitutionality of a similar California statute (Cal. Pen. Code § 647(e)) has repeatedly been upheld by the California courts. *See People v. Solomon,* 33 Cal.App.3d 429, 108 Cal.Rptr. 867 (1973); *People v. Caylor,* 6 Cal.App.3d 51, 85 Cal.Rptr. 497 (1970); *People v. Weger,* 251 Cal.App.2d 584, 59 Cal.Rptr. 661 (1967); *cert. denied,* 389 U.S. 1047 (1968); *People v. Bruno,* 211 Cal.App.2d Supp. 855, 27 Cal.Rptr. 458 (1962).

## IV

### ERROR, IF ANY, WAS HARMLESS BEYOND A REASONABLE DOUBT.

Assuming, without conceding, that the gun should have been suppressed and that the issue of suppression is cognizable on federal habeas corpus, we submit that the error was harmless beyond a reasonable doubt. *Harrington v. California* 395 U.S. 250 (1969); *Chapman v. California,* 386 U.S. 18 (1967). The California court of appeal and the district court have agreed with this conclusion; only the court of appeals has dissented.

The trial record established beyond question that respondent was present in the liquor store when Mrs. Parsons was shot. There is no doubt about his identity or his possession of the murder weapon during the quarrel with Mr. and Mrs. Parsons. Mr. Parsons stated that respondent seized the gun and shot him. Although he did not see respondent shoot his wife, Mr. Parsons heard the shot and returned to find that neither respondent nor the gun was present in the store. Buckley testified that he saw respondent wrest the gun from Mr. Parsons and discharge it; Mrs. Parsons then fell to the floor. After the incident, Buckley told a police officer that respondent "shot the manager's wife. . . ." Chaney testified that he saw respondent grab the gun; he was still in possession of the gun as Chaney fled from the store.

In sum, the evidence other than the gun established conclusively that respondent was at the scene of the crime, was in exclusive possession of the weapon,



and fired the fatal shot. The court of appeals erred in holding to the contrary.

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### CONCLUSION

Petitioner respectfully requests this Court to remand the case to the Court of Appeals for the Ninth Circuit with directions to vacate its opinion and to affirm the order of the District Court denying Powell's petition for writ of habeas corpus.

Dated, August 29, 1975.

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